

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF)
B.W.,) C. M. No. 04193-N-MG
a disabled person.)

MASTERS REPORT

REDACTED PUBLIC VERSION

Date Submitted: May 6, 2011
Draft Report: May 13, 2011
Revised Draft Report: May 16, 2011
Final Report: June 3, 2011

Suzanne I. Seubert, Esquire, of Suzanne I. Seubert, P.A., Wilmington, Delaware,
Attorney Ad Litem for B.W.

Jennifer Gimler Brady, Esquire, of Potter Anderson & Corroon LLP, Wilmington,
Delaware, Attorney for Home of the Merciful Rest Society, Inc. D/a Kentmere Nursing
Care Center.

D.W., pro se, Guardian of B.W.

GLASSCOCK, Master

D.W. is guardian for her mother, B.W. B.W. is currently a resident of a nursing home run by the Home of Merciful Rest Society, Inc. (“Kentmere”). Kentmere has taken the extraordinary step of asking this Court to remove D.W. as guardian for B.W., based on Kentmere’s allegations that D.W.’s actions are interfering with their treatment of and care for B.W. in a way that threatens B.W.’s well-being.¹ Before commenting on this latest issue in B.W.’s guardianship, it would be helpful, I think, to discuss briefly the history of the guardianship.² B.W. is a woman in her nineties suffering from a variety of ailments, including complications from a stroke, hypertension, neuropathy and Alzheimer’s dementia. D.W. was appointed her guardian in 2006. Before 2008, B.W. was a patient at Chancellor Care Center nursing home in Delmar. She suffered a fall and D.W. hired Gary S. Nitsche, Esquire, to pursue a negligence action against Chancellor Care in Superior Court. Mr. Nitsche obtained a settlement on B.W.’s behalf in the amount of \$125,000. D.W. verbally agreed to that settlement. Subsequently, D.W. became dissatisfied with the settlement and refused to execute the settlement documents. The matter was placed before the trial court, which found that D.W. had entered a valid settlement agreement. Since D.W. was obviously unwilling execute the agreement, the Superior Court directed that a substitute guardian ad litem be appointed to oversee administration of the settlement. Williams v. Chancellor Care Center of Delmar, Del.

¹ According to counsel for Kentmere, this is the first such petition they have filed in any guardianship case.

² The following is by no means an exhaustive list of the pleadings and proceedings in this matter, but adequately conveys the difficult nature of this guardianship.

Super., C.A. 06C-05-146MMJ, Johnson, J. (April 22, 2009)(Mem. Op.). As a result, I appointed Tasha Stevens, Esquire, attorney ad litem to opine whether D.W. should be removed as guardian for her mother.

On September 22, 2009, Ms. Stevens issued her report as attorney ad litem. After meeting with D.W., Ms. Stevens opined that, once the settlement was completed, “the Court [should] allow D.W. to continue to act as guardian of the person and property for her mother.” Accordingly, I appointed Ms. Stevens as guardian ad litem to administer the settlement, which was completed by April 22, 2010. I left D.W. in place as guardian for her mother.

On June 17, 2010, Kentmere filed a request for instructions concerning the care of B.W. According to Kentmere, D.W. chronically rejected treatment recommendations made for B.W. by her attending physicians, D.W. refused to provide information to Kentmere staff regarding B.W.’s medicines and medical treatments, and D.W. was abusive and threatening to Kentmere staff. Because at this time both guardian and ward resided in New Castle County, I appointed a new attorney ad litem, Suzanne Seubert, Esquire, to investigate the issues raised by Kentmere’s June 17, 2010 letter.³ A hearing was scheduled for February 23, 2011 to address Kentmere’s allegations, but that hearing was never held because D.W., by letters to the Court, made allegations that Kentmere was attempting to starve her mother by placing her on a pureed food diet and otherwise

³ Ms. Seubert’s office is in New Castle County; Ms. Stevens’s practice is in Sussex County.

mismanaging her care. As a result, I held the hearing on an expedited basis on January 13, 2011. I did not fully reach the allegations and counter allegations of Kentmere or D.W. at that hearing because D.W. informed me she wished to bring B.W. home to live with her. I assigned the guardianship monitor, Sherri Harmer, as well as the attorney ad litem to assist D.W. and facilitate that move. Subsequently, D.W. spurned assistance from Ms. Seubert and Ms. Harmer and made no substantial attempts to move her mother home from Kentmere.

On February 24, 2011, Kentmere's attorney wrote seeking a reopening of the hearing and removal of D.W. as guardian. The letter noted that D.W. had failed to move B.W. from the nursing home and that D.W. was interfering with her mother's care by continuing to challenge the change of B.W.'s diet to pureed food. She continued to accuse the facility of "starving" her mother. She opposed the change in her mother's blood pressure medication recommended by B.W.'s doctor, Dr. Rastogi. She remained abusive to the doctors and staff at Kentmere. On February 24, 2011, the attorney ad litem sought an order directing Kentmere to provide a pureed diet to B.W. and to administer the hypertension medication recommended by B.W.'s physician, despite D.W.'s failure, as guardian, to consent to these actions.

A hearing was held on the outstanding motions on March 7, 2011. At that hearing, Kentmere presented evidence of D.W.'s disruptive and abusive behavior towards staff and doctors. Similarly, the evidence was clear that D.W. was undermining the

recommended diet and medication prescribed for B.W. D.W., for her part, presented her view that Kentmere was plotting to harm or kill B.W. in retaliation for D.W.'s vigilance on her behalf. She made numerous complaints about the facility. At the conclusion of the hearing, I directed the attorney ad litem to find a doctor to perform a medical evaluation of B.W. and to comment on the pureed diet, which according to Kentmere was necessary to prevent B.W. from aspirating food with extremely negative health consequences, and which according to D.W. was part of a plot to starve her mother. I directed that once that medical evaluation had been completed, the parties would have the opportunity to file written closing arguments, and that I would resolve the matter.

After the hearing, on March 7, 2011, D.W. filed a letter with me alleging that Kentmere was conspiring with the State to make the State guardian for B.W. so that it could obtain for itself the funds which B.W. had received from the tort settlement with Chancellor Care. On March 11, 2011, as recited in a memorandum to file created by Renee Kinsey, the Register in Chancery clerk assigned to this matter, she received a telephone call from D.W. D.W. reported that Kentmere had informed her that the nursing home had been quarantined because of a stomach flu outbreak. D.W. alleged that there was no stomach flu outbreak and that the nursing home, in her belief, was simply doing construction work and wanted to use that as an excuse to keep D.W. from seeing her mother. D.W. expressed her concern that Kentmere had placed B.W. on a liquid diet, and would starve her. D.W. asked that her mother be released from the pureed diet and given

chicken noodle soup. At my request, Ms. Harmer, the guardianship monitor, was directed to investigate four allegations made by D.W.: that the nursing home quarantine was a sham, that the interim order requiring a pureed diet was not in B.W.'s best interest, that B.W. be given unpureed chicken noodle soup, and that Kentmere was attempting to starve B.W. The report of the guardianship monitor, which is in the record, found that Kentmere had a "no visitation" policy in place for less than 24 hours due to a gastrointestinal virus, that B.W. had displayed symptoms of the virus and was briefly placed on a liquid diet, that B.W. was being adequately fed at Kentmere, and that none of the allegations made by D.W. could be substantiated. On March 28, 2011, the results of a swallowing study done at St. Francis Hospital were made a part of the record. The report found that B.W. was "unable to advance diet level secondary to confusion and decreased ability to masticate." The recommendation was for a "pureed diet and thin liquids."

On April 1, 2011, the attorney ad litem sought an order directing D.W. to comply with the March 1, 2011 Order of this Court directing that B.W. be given a pureed diet. That petition contained an allegation that D.W. had removed B.W. from her room, taken her to a public bathroom, and there fed her non-pureed chicken. Kentmere joined in that motion and asked that D.W. be given only supervised visitation with B.W. In addition, Kentmere alleged D.W. had "repeatedly and publicly (in the presence of residents, family members, and staff) accused the facility of 'starving' B.W. and 'killing 15 residents since December.'" Kentmere asked that D.W. be enjoined from making these statements

publicly. D.W. responded to these motions by letter, but, significantly in my view, failed to deny that she had fed her mother unpureed food in the bathroom. I issued a report on the outstanding request for interim orders on April 13, 2011. I directed D.W. not to feed B.W. any food other than pureed food and not to feed her in the bathroom under any circumstances. I deferred the request to limit D.W.'s access to B.W. pending submission of closing arguments and decision on the motion to remove D.W. as guardian. I denied Kentmere's request to enjoin D.W.'s public complaints about Kentmere on First Amendment grounds. In the meantime, an independent physical examination (by Dr. David Simpson) had been accomplished, as I had directed at the end of the March 7 hearing. Like the swallowing study, it failed to support D.W.'s concerns, although it did suggest adjustments to B.W.'s blood pressure medication. With the post-hearing medical reports completed, I directed the parties to file closing arguments by April 22, 2011. I provided that "submissions not filed by the close of business on April 22, shall not be considered, absent good cause shown." As D.W. noted to the Court, however, the Court was closed on April 22 for Easter recess. Therefore, the parties were informed that closing arguments were due by 5:00 p.m. on April 25, 2011.

Closing arguments for Kentmere and the attorney ad litem were timely filed. Both Kentmere and the attorney ad litem recommend that D.W. be removed as guardian. D.W., however, requested an extension of time to file her closing argument and I allowed her until Monday, May 2, 2011 at 5:00 p.m. Subsequently, D.W. requested another extension

and I allowed her until May 6, at 5:00p.m. Despite the multiple extensions, D.W. failed to file a timely closing statement. However, on April 21, 2011, D.W. filed a 32-page single spaced letter to me (dated April 5, 2011) which she asks me to consider as part of my evaluation of the request to remove her as guardian. I have done so. The letter makes a number of allegations: that I (together with my “Gang-Style Alliance”—presumably including counsel) is perpetrating a “Modern Day Lynching” of D.W.; that I have refused to permit D.W. to use B.W.’s funds for counsel to represent D.W. (although no petition to expend for that purpose has been filed); that I (and my alliance) are in “pursuit” of B.W.’s money; that Dr. Rastogi and Kentmere were engaged in the same pursuit; that “computer hackers” (presumably under my control) prevented her from producing documents for this litigation, but insured that I “get information in advance of me submitting them to you;” that this Court, “medicaid, and lawyers” are riddled with “systemic corruption;” that I have given Kentmere and Dr. Rastogi “LICENSE TO KILL MS. B. W.,” that the “Alliance” is animated by racial bias; and similar allegations.⁴

This Court has the jurisdiction to appoint, and to remove, guardians for disabled persons. 12 Del. C. §§ 3901, 3908. My sole concern (from a legal perspective) in this matter is the well-being of the ward. This Court is reluctant to appoint an institutional

⁴ The following quote, concerning the hackers who bedevil D.W., is instructive: “FACT: I HAVE HAD TO SCOLD PUBLIC OFFICIALS FOR COMPUTER HACKING WHILE USING COMPUTER, I HAVE TALKED TO WHAT APPEARS TO BE BOUNCER IN PUBLIC PLACE, I HAVE BEEN ASKED BY A STRANGE WHITE MAN IN A BLACK AND WHITE SUIT “WHAT ARE YOU DOING.” FURTHERMORE, A STRANGER CLAIMING TO BE FRIENDS OF EX-ATTORNEY NOW IMPRISONED, MR. THOMAS CAPANO, DID FOREWARNED ME ACCURATELY THAT YOU AND YOUR ALLIANCE WOULD GANG UP ON ME....”

guardian where a family member is willing to serve. The Court solicitude toward family-member-guardians exists because in most cases, that is what is beneficial for the ward. Where a guardian's behavior is detrimental to the ward, the Court will not hesitate to remove her in favor of an institutional guardian if that is appropriate. This is true even where, as here, the Court is convinced that the guardian firmly believes that her actions are in the best interest of the ward.

At the hearing, Dr. Rastogi, B.W.'s primary care physician, testified that D.W. had threatened her,⁵ that D.W. refused to allow B.W. medication for pain from neuropathy or for chronic bronchitis;⁶ and that D.W. refuses to allow swallowing tests recommended for her mother, won't consent to the needed pureed diet and won't allow Dr. Rastogi to vary her blood pressure medication as needed.⁷ She testified that B.W. had an abscess on her jaw that could have been cancerous, but that D.W. refused to allow a study to be done to rule out cancer.⁸ Finally, Dr. Rastogi testified that D.W. was abusive to her, had told her that "you will pay" for her treatment of B.W., and that Dr. Rastogi felt unable to continue to work with D.W. regarding B.W.'s care.⁹

⁵ Transcript of hearing held March 7, 2011 ("Transcript") at 30.

⁶ Transcript, at 31-34.

⁷ Transcript, at 34-39.

⁸ Transcript, at 41-43.

⁹ Transcript, at 49-50.

In her testimony, D.W. did not deny these allegations;¹⁰ instead, she explained why her actions were justified given what she believes are the evil actions of Dr. Rastogi and Kentmere. For instance, D.W. testified that her mother was being “drugged” by Kentmere in retaliation against D.W., that the attorney ad litem, Kentmere and “the State” were allied against her, and that only a non-Delaware attorney could fairly represent her mother.¹¹ Despite her testimony that Kentmere was starving and drugging B.W. in retaliation for D.W.’s attempts to intervene on her mother’s behalf, D.W. indicated that she was only “considering” moving her mother to another residence, a fact she could not explain despite repeated opportunities to do so.¹²

In light of the testimony and other facts of record, it is clear to me that D.W. sincerely believes that she is acting in B.W.’s best interest. It is also clear that her beliefs are not rational in light of the facts. The medical evidence, including the independent medical report and the swallowing study, indicate that B.W. is receiving appropriate care at Kentmere, including medication and diet. It has been abundantly demonstrated that D.W. is interfering with Kentmere’s ability to provide appropriate care, by refusing reasonable consent to medication, treatment and medical testing, and by feeding her mother a non-pureed diet. It is also clear that the relationship between D.W. and Dr.

¹⁰ D.W. did deny threatening Dr. Rastogi.

¹¹ Transcript, at 180, 193-96.

¹² Transcript, 196-97.

Rastogi is such that B.W. cannot continue to receive adequate treatment at Kentmere if D.W. remains her guardian.¹³ Of course, one remedy for this situation would be transfer of B.W. to a third nursing home. Given the nature of D.W.'s complaints against Kentmere, and the lack of factual support of record for those complaints, I doubt whether another nursing home would prove satisfactory to D.W. In any event, as described above, D.W. has shown scant inclination to move B.W., which given the nature of her allegations I find inexplicable.¹⁴

D.W. is an intelligent woman who cares deeply for her mother. If my evaluation of this question were influenced solely by the love and concern demonstrated by a guardian for her ward, it would be clear that D.W. would be the ideal guardian for B.W. D.W. obviously loves her mother and is a strong advocate for her. It is clear to me that D.W. sincerely believes that Kentmere, like (in D.W.'s opinion) Chancellor Care before it, is intent on doing her mother harm, motivated either by a desire to strike at D.W. through B.W., or to wrongfully obtain the tort settlement proceeds received from Chancellor Care. D.W. believes the pureed diet and medication regimen suggested by Dr. Rastogi are part of the plot to injure her mother. She believes that the quarantine briefly put in place by Kentmere was a part of this conspiracy. She is deeply distrustful of Dr.

¹³ The state long-term care ombudsman, Bonnie Croney, testified that she attempted to mediate between D.W. and Kentmere, with no success.

¹⁴ Perhaps she believes that any nursing home would be part of the widespread conspiracy which she perceives against her.

Rastogi and other Delaware doctors, and as a result is demonstrably unable to make timely consents for needed medical care.¹⁵ Therefore, despite the sincere love and concern which D.W. feels for B.W., it is no longer in B.W.'s best interest that D.W. continue as guardian of her mother's person. Accordingly, I appoint the Public Guardian as successor guardian for B.W. With respect to visitation between D.W. and B.W., I believe such visitation is in B.W.'s best interest, so long as D.W. respects the care decisions of the successor guardian. I leave it to the successor guardian to determine what restrictions, if any, on visitation should be imposed. Should the Public Guardian discover that a suitable family member or fee-for-service guardian is the appropriate successor guardian for B.W., she may recommend that such guardian be appointed, by appropriate motion. Finally, with respect to whether D.W. should remain guardian of B.W.'s property, I reserve decision pending the recommendation of the Public Guardian.

/s/ Sam Glasscock, III
Master in Chancery

cc: Office of the Public Guardian

¹⁵ Sadly, the conspiracy that D.W. perceives now includes the State, the attorney ad litem, and this Court.